

1 Alison K. Hurley, State Bar No. 234042  
ahurley@bremerwhyte.com  
2 Courtney M. Serrato, State Bar No. 311141  
cserrato@bremerwhyte.com  
3 BREMER WHYTE BROWN & O'MEARA LLP  
20320 S.W. Birch Street  
4 Second Floor  
Newport Beach, California 92660  
5 Telephone: (949) 221-1000  
Facsimile: (949) 221-1001

6 Attorneys for Defendants,  
7 FRANK FERRARA and CHARLIE FERRARA

8 **UNITED STATES DISTRICT COURT**  
9 **CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION**

10  
11 CORY SPENCER, an individual; DIANA  
12 MILENA REED, an individual; and  
COASTAL PROTECTION RANGERS,  
13 INC., a California non-profit public  
benefit corporation,

14 Plaintiff,

15 vs.

16 LUNADA BAY BOYS; THE  
INDIVIDUAL MEMBERS OF THE  
17 LUNADA BAY BOYS, including but not  
limited to SANG LEE, BRANT  
18 BLAKEMAN, ALAN JOHNSTON AKA  
JALIAN JOHNSTON, MICHAEL RAE  
19 PAPAYANS, ANGELO FERRARA,  
FRANK FERRARA, CHARLIE  
20 FERRARA; CITY OF PALOS VERDES  
ESTATES; CHIEF OF POLICE JEFF  
21 KEPLEY, in his representative capacity;  
and DOES 1-10,

22 Defendants.  
23

Case No. 2:16-cv-2129

Judge: Hon. S. James Otero  
Ctm: 10C

Magistrate Judge:  
Hon. Rozella A. Oliver

**DEFENDANTS FRANK  
FERRARA'S AND CHARLIE  
FERRARA'S OBJECTIONS TO  
MAGISTRATE JUDGE OLIVER'S  
REPORT AND  
RECOMMENDATION**

Complaint Filed: March 29, 2016  
Trial Date: December 12, 2017

24 Defendants, Frank Ferrara and Charlie Ferrara (hereinafter, collectively the  
25 "Ferraras"), hereby submit the following Objections to U.S. Magistrate Judge  
26 Oliver's Report and Recommendation and Memorandum of Points and Authorities in  
27 support of such Objections. (Dkt. No. 496.)  
28

**DEFENDANTS FRANK AND CHARLIE FERRARA'S OBJECTION TO  
MAGISTRATE JUDGE OLIVER'S REPORT AND RECOMMENDATION**

Pursuant to Federal Rule of Civil Procedure 71(a) and Local Rule 72-2.1, Defendants Frank Ferrara and Charlie Ferrara object to U.S. Magistrate Judge Oliver's Report and Recommendation filed on October 10, 2017. (Dkt. No. 496.) Defendants Frank and Charlie Ferrara Object to the Report and Recommendation as follows:

1. Defendants object to the recommended monetary sanctions against Frank and Charlie Ferrara for attorneys' fees associated with Plaintiffs in filing their Motion for Evidentiary Sanctions, as the issue of monetary sanctions as to all discovery matters was resolved following the issuance of the Court's August 23, 2017 Order granting Plaintiffs' Motion for Sanctions. (Dkt. No. 432.) Counsel for the Ferraras and Plaintiffs met and conferred on the issue of monetary sanctions and the Ferraras agreed to pay the full amount Plaintiffs' requested (\$32,137.50) to fully and finally resolve monetary sanctions related to all discovery disputes between the parties as of August 29, 2017. As Plaintiffs' Motion for Evidentiary Sanctions (Dkt. No. 425) was filed on August 22, 2017, monetary sanctions associated with the same were included in the August 29, 2017 settlement. Therefore, no additional monetary sanctions associated with discovery related issues may issue;
2. The Ferraras do not object to Plaintiffs conducting the depositions of Frank and Charlie Ferrara on the limited issue of spoliation as Recommended by Magistrate Judge Oliver. The Ferraras do however object to the Recommendation that the cost of said depositions be borne entirely by the Ferraras; and
3. Plaintiffs did not request additional monetary relief in connection with either the initial or second Motion for Sanctions, and specifically requested only evidentiary sanctions (Dkt. Nos. 425 & 468). Defendants object to the monetary sanction Recommended as it is outside of the scope of Plaintiffs' requested relief.

Defendants respectfully request that the Court decline to adopt the above-referenced portions of the Recommendation.

///

**MEMORANDUM OF POINTS AND AUTHORITIES**

**1. FACTUAL BACKGROUND**

On July 13, 2017, the Court Ordered that Charlie and Frank Ferrara “produce responsive documents from the cell phone imaging and responsive cell phone bills and records” by 5:00 p.m. on Monday, July 17, 2017. (Dkt. No. 267.) Plaintiffs filed a Motion for Monetary Sanctions based on the Defendants failure to comply with that Order on August 14, 2017. (Dkt. No. 403.) Therein, Plaintiffs sought relief in the form of monetary sanctions for the hours Plaintiffs’ Counsel has spent to obtain discovery from Defendants for the time period of January of 2017 through August 14, 2017. (Dkt. 403.) In support of the same, Plaintiffs submitted a detailed statement of the hours spent on the dispute, attached to the Declaration of Samantha Wolff. (Dkt. 403, Ex. 24 to Wolff Declaration.)

A Minute Order issued on August 23, 2017 granting Plaintiffs’ Motion for Sanctions based on the failure to comply with the Court’s July 13, 2017 Order. (Dkt. No. 432.) Although Plaintiffs’ requested sanctions of \$32,137.50, (Dkt. No. 403.), the Court ordered Plaintiffs’ Counsel to submit a further declaration identifying only the expenses resulting from Defendants’ failure to comply with the Court’s July 13, 2017 Order. (Dkt. No. 432.) (Emphasis added.) Thus, the monetary sanction to Plaintiff was going to issue in an amount less than \$32,137.50. Plaintiffs declaration was due to be submitted by September 7, 2017. (Dkt. No. 432.)

On August 29, 2017 Counsel for the Ferraras and Plaintiffs agreed to fully and finally resolve monetary sanctions related to all discovery disputes between the parties as of that date. (Hurley Decl., at ¶ 6, Ex. 4.) Counsel for the Ferraras negotiated and settled with Counsel for Plaintiffs on a monetary figure which included Counsel for the Ferraras paying all of Plaintiffs’ requested sanctions for any issues related to the discovery dispute and not just the violation of the July Order. Per the agreement between Counsel for the Ferraras and Plaintiffs, the Parties agreed “The amount paid by BWBO shall constitute a voluntary settlement of the entirety of Plaintiffs requests

1 for monetary sanctions dealing with all existing discovery disputes between the Parties  
2 as of today,” on August 29, 2017. (Hurley Decl., at ¶¶ 6 -7, Ex. 4 and 5.) Counsel for  
3 Plaintiffs filed a declaration with the Court confirming that the sanction issue had been  
4 resolved:

5 “After this Court’s August 23, 2017 ruling, the parties agreed to resolve  
6 Plaintiffs’ Monetary Sanctions Motion (Dkt. 403) through Defendants’ payment of the  
7 *amount sought by Plaintiffs in their motion.*” (Dkt. No. 444.) (emphasis added.)

8 Further the Declaration specifically confirmed that “Plaintiffs now consider  
9 their Monetary Sanctions Motion (Dkt. 403) resolved and no longer seek the Court’s  
10 assistance in determining the amount to be awarded for Defendants’ failure to comply  
11 with the Court’s July 13, 2017 Order. Additionally, *Plaintiffs will not seek any further*  
12 *monetary sanctions from the Court for the alleged spoliation of evidence raised in*  
13 *Plaintiffs’ Monetary Sanctions Motion.*” (Dkt. No. 444.) (emphasis added.) When  
14 Counsel for the Ferraras and Plaintiffs resolved the monetary sanctions issue identified  
15 in the August 23, 2017 Order, they resolved all monetary sanctions that had or could  
16 arise from this discovery dispute. The issue of monetary sanctions was therefore fully  
17 and finally resolved between Counsel based on the Ferraras’ agreement to pay more  
18 than the Court would Order in connection with its August 23, 2017 Order.

19 Pursuant to a valid agreement amongst Counsel for the Ferraras and Plaintiffs,  
20 Plaintiffs have accepted payment from the Ferraras in exchange for the release of their  
21 right to recover monetary sanctions resulting from any discovery dispute. The  
22 Recommendation of a monetary sanction would directly conflict with the agreement  
23 between the Parties resolving all monetary sanctions arising out of a discovery dispute.

## 24 **2. ARGUMENT**

### 25 2.2 *The Report and Recommendation Conflicts With An Agreement Made* 26 *Between Counsel for The Ferraras and Plaintiffs Resolving All* 27 *Monetary Sanctions Arising From A Discovery Dispute.*

27 ///

28 ///



1 Per the Court's Minute Order on August 23, 2017, the Court granted Plaintiffs'  
2 Motion for Sanctions against Counsel for the Ferraras' based on the Ferraras' failure  
3 to comply with the Court's Order of July 13, 2017. (Dkt. No. 432.) Notably,  
4 Plaintiffs' originally requested sanctions in the amount of \$32,137.50 when filing  
5 their Motion for the hours worked by Plaintiffs' Counsel since January of 2017 to  
6 obtain discovery, (Dkt. No. 403), however, the Court ordered Plaintiffs' Counsel to  
7 submit a declaration for only a subset of these monetary sanctions, specifically,  
8 "payment of reasonable expenses 'caused by the failure' to comply with the Court's  
9 discovery order" only. (Dkt. No. 432.) (*See* Fed. R. Civ. P. 37(b)(2)(C)). Therefore,  
10 per the Court, the monetary sanction to Plaintiff was going to issue a lesser amount  
11 than Plaintiffs originally requested \$30,000.00 figure. Furthermore, the Court  
12 directed Plaintiffs to submit a further Declaration detailing only the reasonable  
13 expenses, including attorneys' fees, caused by the failure to comply with the Court's  
14 Order by September 7, 2017. (Dkt. No. 432.)

15 In an effort to resolve all monetary sanctions arising out of the discovery  
16 dispute amongst Plaintiffs and Frank and Charlie Ferrara, Counsel for the Ferraras  
17 made contact with Plaintiffs' Counsel to discuss resolution of the same. On August  
18 25, 2017 at 2:52 p.m. Jeremy Johnson of Bremer Whyte Brown and O'Meara,  
19 Counsel for the Ferraras, contacted Plaintiffs' Counsel, Samantha Wolff to discuss  
20 resolving the issue regarding Plaintiffs' Motion for Monetary Sanctions. (Hurley  
21 Decl., at ¶ 3, Ex. 1.) Later that same day, Counsel for the Ferraras exchanged  
22 another email with Counsel for Plaintiffs confirming a phone conversation in which  
23 Plaintiffs indicated they were seeking the full amount of \$32,137.50. (Hurley Decl.,  
24 at ¶ 3, Ex. 1.) On Monday August 28, 2018 at 11:05 a.m., Counsel for Plaintiff  
25 responded to Counsel for the Ferraras stating the amount and breakdown of such  
26 attorneys' fees, which exceeded \$30,000.00. (Hurley Decl., at ¶ 4, Ex. 2.) Counsel  
27 for the Ferraras indicated its firm's leadership group would be advised and Counsel  
28 for the Ferraras would communicate with Plaintiffs' Counsel the following day.

1 (Hurley Decl., at ¶ 5, Ex. 3.)

2 On Tuesday August 29, 2017 at 3:35 p.m. Counsel for the Ferraras wrote an  
3 email to Counsel for Plaintiffs confirming they “had reached an agreement to  
4 voluntarily resolve the entirety of the monetary aspect of Plaintiffs’ collective  
5 discovery disputes between Plaintiffs, my firm, and Defendants Frank and Charlie  
6 Ferrara (herein collectively “the Parties”) as follows:” then listing the terms of the  
7 agreement. (Hurley Decl., at ¶ 6, Ex. 4.) On Wednesday August 30, 2017 at 11:56  
8 a.m. Plaintiffs’ Counsel responded to the email with comments as well as a draft of  
9 the proposed Declaration to be filed with the Court. (Hurley Decl., at ¶ 7, Ex. 5.)  
10 Ultimately, Counsel for the Ferraras and Plaintiffs agreed that the full amount  
11 requested as relief by Plaintiffs for \$32,137.50 would be paid by Counsel for the  
12 Ferraras, despite the Court’s Order that the monetary sanction to Plaintiff was going  
13 to issues in an amount less than this figure, in order to resolve Plaintiffs’ monetary  
14 aspect of this discovery dispute in its entirety.

15 Plaintiffs’ counsel confirmed on August 30, 2017 at 11:56 a.m.: “Plaintiffs  
16 agree (as noted in the above bullet point) that this present negotiation resolves all  
17 pending requests for monetary sanctions arising out of the alleged spoliation of  
18 Charlie and Frank Ferrara’s cell phone bills and text messages and noncompliance  
19 with the July 13, 2017 Order.” (Hurley Decl., at ¶ 7, Ex. 5.) The evidence  
20 demonstrates that the Ferraras and Plaintiffs resolved the issue of monetary sanctions  
21 in relation to discovery completely as of August 29, 2017. The settlement figure  
22 reached, in excess of the Court’s recommended award, was paid by the Ferraras to  
23 avoid further motions for monetary sanctions relating to discovery, settling the  
24 monetary aspect of the discovery dispute once and for all.

25 On August 30, 2017 at 11:56 a.m., Counsel for Plaintiffs sent Counsel for the  
26 Ferraras a draft of the proposed declaration to submit to the Court and on the same  
27 day, Counsel for the Ferraras responded with minor clarification and edits. (Hurley  
28 Decl., at ¶ 8, Ex. 6.) By Thursday August 31, 2017, Counsel for the Ferrara’s had

1 confirmed in writing to Plaintiffs' Counsel the agreement per the stipulated terms  
2 exchanged with respect to the issue of monetary sanctions between the Parties in  
3 relation to the discovery matter to date. (Hurley Decl., at ¶ 9, Ex. 7.)

4 The Declaration filed by Samantha Wolff on September 5, 2017 states: "After  
5 this Court's August 23, 2017 ruling, the parties agreed to resolve Plaintiffs'  
6 Monetary Sanctions Motion (Dkt. 403) through Defendants' payment of the *amount*  
7 *sought by Plaintiffs in their motion*" which exceeded what the Court would have  
8 granted in the Order per Docket 432. (Hurley Decl., at ¶ 10, Ex. 8, Decl. of Wolff, at  
9 Dkt. No. 444; Hurley Decl., at ¶ 11, Ex. 9, Decl. of Wolff, at Dkt. No. 403-2.)  
10 Further, Plaintiffs specifically confirmed: "Plaintiffs now consider their Monetary  
11 Sanctions Motion (Dkt. 403) resolved and no longer seek the Court's assistance in  
12 determining the amount to be awarded for Defendants' failure to comply with this  
13 Court's July 13, 2017 Order. Additionally, Plaintiffs will not seek any further  
14 monetary sanctions from the Court for the alleged spoliation of evidence raised in  
15 Plaintiffs' Monetary Sanctions Motion." (Hurley Decl., at ¶ 10, Ex. 8, Decl. of Wolff  
16 at Dkt. No. 444.) (Emphasis added.) Therefore, when Counsel for the Ferraras and  
17 Counsel for Plaintiffs agreed to the settlement sum on the monetary portion of the  
18 Discovery sanction motion figure, this was not simply to resolve the violation of the  
19 Court's Order at Docket No. 432, but also to compromise with Counsel as to the  
20 monetary value for *all* issues related to this discovery dispute.

21 Moreover, this Declaration by Samantha Wolff mentions that Plaintiffs will  
22 continue to pursue their pending Motion for Sanctions against Frank and Charlie  
23 Ferrara and Sang Lee, but specifically states this relief only seeks evidentiary  
24 sanctions such as an adverse inference. (Hurley Decl., at ¶ 10, Ex. 8, Decl. of Wolff,  
25 at Dkt. No. 444, *See* Dkt. No. 425.) Had Plaintiffs intended to reserve the issue of  
26 monetary sanctions relating to the Docket No. 425 evidentiary sanctions motion,  
27 language effectuating that reservation would have to have been included, but were  
28 not.

1                   2.2.1 *The Cost of the Ferraras' Depositions on Spoliation Should be*  
2                   *Split Between The Ferraras and Plaintiffs.*

3           The Ferraras do not object to submitting to depositions on the limited issue of  
4 spoliation. However, Defendants Frank and Charlie Ferrara object to bearing 100%  
5 of the cost of the depositions as this would constitute a monetary sanction on a  
6 discovery issue, and therefore was resolved by the August 29, 2017 agreement.

7           2.3 *The Report and Recommendation Proposes Relief the Plaintiffs Did Not*  
8           *Request.*

9                   2.3.1 *Due To The Agreement Between Counsel To Resolve All*  
10                   *Monetary Issues Related To This Discovery Dispute, Counsel for*  
11                   *Plaintiffs Did Not Request Monetary Relief In Their Motion.*

12           As discussed at length above, the August 29, 2017 agreement between  
13 Counsel for the Ferraras and Counsel for Plaintiffs acknowledged Plaintiffs release  
14 of their right to further monetary sanctions while retaining the right to seek  
15 evidentiary sanctions. (Hurley Decl., at ¶ 10, Ex. 8, Decl. of Wolff, at Dkt. No. 444.)  
16 In support of this, the Declaration of Samantha Wolff states, "Plaintiffs will continue  
17 to pursue their pending Motions for Sanctions against Defendants Charlie Ferrara,  
18 Frank Ferrara and Sang Lee, which seeks evidentiary sanctions and an adverse  
19 inference," and does not reserve the issue to seek additional monetary sanctions.  
20 (Hurley Decl., at ¶ 10, Ex. 8, Decl. of Wolff, at Dkt. No. 444.) And pursuant to the  
21 agreement between the Parties, Plaintiffs confirmed that, "this present negotiation  
22 resolves all pending requests for monetary sanctions arising out of the alleged  
23 spoliation of Charlie and Frank Ferrara's cell phone bills and text messages . . ." and  
24 further agreed, "The amount paid by BWBO shall constitute a voluntary settlement  
25 of the entirety of Plaintiffs requests for monetary sanctions dealing with all existing  
26 discovery disputes between the Parties" to date. (Hurley Decl., at ¶ 7, Ex. 5.)

27           All the above is supported by the fact that Plaintiffs did not include any  
28 request for monetary relief in filing their Motion for Evidentiary Sanctions. (Dkt. No.



1 425.)

2 Notice and the opportunity to be heard on the record are required before a  
3 sanction of attorney's fees may be imposed pursuant to Fed. R. Civ. P. 37. (*See*  
4 Falstaff Brewing Corp. v. Miller Brewing Co., (9th Cir. 1983) 702 F.2d 770, 784,  
5 footnote 11.) Plaintiffs did not seek *any monetary relief* in their Motion for  
6 Evidentiary Sanctions filed on August 22, 2017, and instead limited the requested  
7 relief to that of an adverse inference or jury instruction.<sup>1</sup> (Dkt. No. 425.) Therefore,  
8 the Recommendation would not only grant Plaintiffs' relief they never requested, but  
9 relief Plaintiffs had previously released in connection with the resolution of the  
10 August 2017 sanctions Motion.

11 During the Hearing on Plaintiffs Motion for Sanctions on October 12, 2017,  
12 Plaintiffs' Counsel confirmed to the Court that "Plaintiffs reached an agreement with  
13 Charlie and Frank Ferrara on the motion for monetary sanctions, that agreement was  
14 only related to the amount of the sanctions, not to the issue of whether or not  
15 information was destroyed, none of that. That's what this hearing is about." (Hurley  
16 Decl., at ¶ 12, Ex. 10, Hearing Transcript at Dkt. No. 515, Citing Ms. Wolff at p. 42:  
17 18-23.)

18 Plaintiffs made no request for monetary sanctions at the hearing on October  
19 12, 2017 or in any briefing filed in advance of the same. As a result, the Ferraras  
20 were deprived of any opportunity to brief or argue the issue before the  
21 Recommendation for the same. The Report and Recommendation exceeds the scope  
22 of Plaintiffs' request for relief and relief available to Plaintiffs' under the  
23 circumstances. (*See* Martinez v. Columbia Sportswear USA Corp., 2011 U.S. Dist.  
24 LEXIS 67012 (E.D. Cal. June 2011) (Arzaga v. Reed, 2013 U.S. Dist. LEXIS 76245  
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26 <sup>1</sup> In Myspace, Inc. v. Wallace, Myspace requested monetary sanctions in the amount  
27 of \$15,156.23. However, because MySpace's request for monetary sanctions was not  
28 contained in the written Notice of Motion and Third Motion for Fed. R. Civ. P. 37  
Sanctions against Defendant, the Court stated it should be rejected on that basis.  
(2008 U.S. Dist. LEXIS 31961, footnote 1.)

1 (E.D. Cal. 2013.).)

2                   2.3.2 *The Recommendation is Not Proportional and Recommends*  
3                   *Measures Greater Than Necessary To Cure Any Prejudice to*  
4                   *Plaintiffs.*

5           Pursuant to Federal Rules of Civil Procedure 37(e)(1) “upon finding prejudice  
6 to another party from loss of the information, may order measures no greater than  
7 necessary to cure the prejudice.” Here, Plaintiffs requested sanctions in the form of  
8 evidentiary sanctions only. The Court recommends that in curing the prejudice to  
9 Plaintiffs that additional monetary sanctions be granted as to Plaintiffs. However, this  
10 relief is not proportional to the relief requested and instead impinges on an agreement  
11 made between Counsel for the Ferraras and Plaintiffs, which resolved all such  
12 monetary sanction issues.

13 **4. CONCLUSION**

14           For the reasons set forth herein, the Ferraras object to the above sections of the  
15 Report and Recommendation, specifically that Plaintiffs be granted any monetary  
16 sanctions in the form of attorneys’ fees for filing said Motion for Evidentiary  
17 Sanctions and for the costs associated with Plaintiffs deposing Frank and Charlie  
18 Ferrara.

19 Dated: November 3, 2017

BREMER WHYTE BROWN & O’MEARA  
LLP

21 By: \_\_\_\_\_

22 Alison K. Hurley  
23 Courtney M. Serrato  
24 Attorneys for Defendants  
25 FRANK FERRARA and CHARLIE  
26 FERRARA  
27  
28

**PROOF OF SERVICE**

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action. My business address is 20320 S.W. Birch Street, Second Floor, Newport Beach, California 92660.

On November 3, 2017, I served the within document(s) described as:  
FRANK FERRARA'S AND CHARLIE FERRARA'S OBJECTIONS TO MAGISTRATE  
JUDGE OLIVER'S REPORT AND RECOMMENDATION

on the interested parties in this action as stated on the attached mailing list.


☒ (BY MAIL) By placing a true copy of the foregoing document(s) in a sealed envelope addressed as set forth on the attached mailing list. I placed each such envelope for collection and mailing following ordinary business practices. I am readily familiar with this Firm's practice for collection and processing of correspondence for mailing. Under that practice, the correspondence would be deposited with the United States Postal Service on that same day, with postage thereon fully prepaid at Newport Beach, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

☒ (BY ELECTRONIC SERVICE) Complying with Code of Civil Procedure § 1010, I caused such document(s) to be Electronically Filed and Served through the \_ for the above-entitled case. Upon completion of transmission of said document(s), a filing receipt is issued to the filing party acknowledging receipt, filing and service by 's system. A copy of the filing receipt page will be maintained with the original document(s) in our office.

Executed on November 3, 2017, at Newport Beach, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Kimberly Macey  
(Type or print name)

  
(Signature)

**Cory Spencer v. Lunada Bay Boys et al.,**

**Case No. 2:16-cv-2129-SJO**

**BWB&O CLIENT: Frank and Charlie Ferrara**  
**BWB&O FILE NO.: 1178.176**

**SERVICE LIST**

<p>Samantha Wolff, Esq.  <b>HANSON BRIDGETT</b>  425 Market Street  26th Floor  San Francisco, CA 94105  (415) 777-3200  (415) 541-9366 Fax  Attorneys For <b>PLAINTIFF</b></p> <p><a href="mailto:swolff@hansonbridgett.com">swolff@hansonbridgett.com</a>  <a href="mailto:kfranklin@hansonbridgett.com">kfranklin@hansonbridgett.com</a></p>	<p>Tyson M. Shower, Esq.  <b>HANSON BRIDGETT</b>  500 Capitol Mall  Suite 1500  Sacramento, CA 95814  (916) 442-3333  (916) 442-2348 Fax  Attorneys For <b>PLAINTIFFS</b></p> <p><a href="mailto:tshower@hansonbridgett.com">tshower@hansonbridgett.com</a></p>	<p>Victor Otten, Esq.  <b>OTTEN LAW, PC</b>  3620 Pacific Coast Highway  Suite 100  Torrance, CA 90505  (310) 378-8533  (310) 347-4225 Fax  Attorneys For <b>PLAINTIFFS</b></p> <p><a href="mailto:vic@ottenlawpc.com">vic@ottenlawpc.com</a></p>
<p>Jacob Song, Esq.  <b>KUTAK ROCK LLP</b>  5 Park Plaza  Suite 1500  Irvine, CA 92614  (949) 417-0999  (949) 417-5639  Attorney For <b>CITY OF PALOS VERDES ESTATES and JEFF KEPLEY, in his representative capacity, serves as the Chief of Police Department of Defendant City of Palos Verdes Estates.</b></p> <p><a href="mailto:jacob.song@kutakrock.com">jacob.song@kutakrock.com</a></p>	<p>J. Patrick Carey, Esq.  <b>LAW OFFICE OF PATRICK CAREY</b>  1230 Rosecrans Avenue  Suite 270  Manhattan Beach, CA 90266  (310) 526-2237  (310) 356-3671 Fax  Attorney For <b>ALAN JOHNSTON individual member of LUNADA BAY BOYS aka JALIAN JOHNSTON</b></p> <p><a href="mailto:pat@patcareylaw.com">pat@patcareylaw.com</a></p>	<p>Aaron G. Miller, Esq.  <b>THE PHILIPS FIRM</b>  800 Wilshire Boulevard  Suite 1550  Los Angeles, CA 90017  (213) 244-9913  (213) 244-9915 Fax  Attorneys For <b>ANGELO FERRARA</b></p> <p><a href="mailto:amiller@thephillipsfirm.com">amiller@thephillipsfirm.com</a></p>
<p>Mark Fields, Esq.  <b>LAW OFFICES OF MARK C. FIELDS</b>  333 So. Hope Street  Suite 3500  Los Angeles, CA 90071  (213) 617-5225  (213) 629-2420 Fax  Attorney For <b>ANGELO FERRARA an individual member of LUNADA BAY BOYS and N.F. an individual member of LUNADA BAY BOYS</b></p> <p><a href="mailto:fields@markfieldslaw.com">fields@markfieldslaw.com</a></p>	<p>Peter R. Haven, Esq.  <b>HAVEN LAW</b>  1230 Rosecrans Avenue  Suite 300  Manhattan Beach, CA 90266  (310) 272-5353  (213) 477-2137 Fax  Attorneys For <b>MICHAEL RAY PAPAYANS</b></p> <p><a href="mailto:peter@havenlaw.com">peter@havenlaw.com</a></p>	<p>Dana Alden Fox, Esq.  <b>LEWIS BRISBOIS BISGAARD &amp; SMITH, LLP</b>  633 W. 5<sup>th</sup> Street  Suite 4000  Los Angeles, CA 90071  (213) 580-3858  (213) 250-7900 Fax  Attorneys For <b>SANG LEE</b></p> <p><a href="mailto:Dana.Fox@lewisbrisbois.com">Dana.Fox@lewisbrisbois.com</a></p>



1 Robert S. Cooper, Esq. BUCHALTER NEMER, APC 2 1000 Wilshire Boulevard Suite 1500 3 Los Angeles, CA 90017 (213) 891-5230 4 (213) 896-0400 Fax Attorneys for BRANT 5 BLAKEMAN 6 <u>rcooper@buchalter.com</u> 7	Peter Crossin, Esq. VEATCH CARLSON, LLP. 1055 Wilshire Boulevard 11th Floor Los Angeles, CA 90017 (213) 381-2861 (213) 383-6370 Attorneys for BRANT BLAKEMAN <u>pcrossin@veatchfirm.com</u>	Daniel M. Crowley, Esq. Jackie Vu, Esq. BOOTH MITCHELL & STRANGE, LLP 707 Wilshire Boulevard Suite 4450 Los Angeles, CA 90017 (213) 738-0100 (213) 380-3308 Fax Attorneys for SANG LEE <u>dmcrowley@boothmitchel.com</u> <u>ikvu@boothmitchel.com</u>
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